



COMMONWEALTH of VIRGINIA

M. NORMAN OLIVER, MD, MA
STATE HEALTH COMMISSIONER

Department of Health
PO BOX 2448
RICHMOND, VA 23218

TTY 7-1-1 OR
1-800-828-1120

December 9, 2019

Matthew Jenkins, Esquire
Hunton Andrews Kurth
951 East Byrd Street
Richmond, Virginia 23219

**RE: CERTIFICATE OF PUBLIC NEED
(COPN or "Certificate")
NUMBER VA-04693
(REQUEST NUMBER VA-8437)
Bon Secours Mary Immaculate Hospital and Peninsula ASC, LLC
Planning District (PD) 21
Establishment of a New Outpatient Surgery Center through Relocation of
Two Operating Rooms**

Dear Mr. Jenkins:

In accordance with Article 1.1 of Chapter 4 of Title 32.1 (§ 32.1-102.1 *et seq.*) of the Code of Virginia, I have reviewed the application captioned above and the record compiled in relation to the project proposed in that application. As required by Subsection B of Virginia Code § 32.1-102.3, I have considered all matters, listed therein, that must be taken into account in making a determination of public need.

I have received, reviewed and adopted the enclosed findings, conclusions and recommended decision of the adjudication officer who convened the informal fact-finding conference to discuss the application, and who reviewed the administrative record pertaining to the proposed project.

Based on my review of the project and on the recommended decision of the adjudication officer, I am approving the project proposed by Bon Secours Mary Immaculate Hospital and Peninsula ASC, LLC (the "BSMIH-Peninsula ASC project"). The project merits approval and should result in issuance of a Certificate. It is necessary to meet a public need.

The reasons for my decision include the following:

- (i) The BSMIH-Peninsula ASC project is consistent with the State Medical Facilities Plan (SMFP), or is in overall harmony or general agreement with the SMFP and the public interests and purposes to which that plan is devoted;
- (ii) Approval of the proposed project would responsibly reallocate existing authorized resources without adding to the surplus of ORs in PD 21;
- (iii) The project would promote operational efficiency, clinical sophistication and cost effectiveness by providing a dedicated ambulatory setting for performing complex orthopedic procedures presently performed in a higher-cost hospital setting;
- (iv) Approval of the project would have minimal negative effect on competition or the utilization of existing providers of surgical services in PD 21; and
- (v) The project is feasible and no alternatives offering the benefits of the project exist.

While this letter announces an approval of an application, in an abundance of caution, I advise that, in accordance with Rule 2A:2 of the Rules of the Supreme Court of Virginia, any aggrieved party to an administrative proceeding choosing to appeal a case decision* shall file, within 30 days after service of the case decision, a signed notice of appeal with "the agency secretary." I would consider such a notice sufficiently filed if it were addressed and sent to the Office of the State Health Commissioner, and timely received by that office, at the James Madison Building, Thirteenth Floor, 109 Governor Street, Richmond, Virginia 23219. Under the Rule, when service of a decision is "accomplished by mail," three days are added to the 30-day period.

Sincerely,



M. Norman Oliver, MD, MA
State Health Commissioner

cc (via email):
Thomas Franck, MD
Acting Director, Peninsula Health District
Amanda Lavin, Esq.
Assistant Attorney General

* In accordance with Va. Code § 2.2-4023, the signed original of these final agency case decisions "shall remain in the custody" of the Department, while the applicants are receiving a photocopy of the original case decision letter.

Matthew Jenkins, Esq.
December 2019
Page 3 of 3

c (cont'd):

Deborah Waite
Virginia Health Information
Erik O. Bodin, III
Director, Division of
Certificate of Public Need
Douglas R. Harris, JD
Adjudication Officer

COPY

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HEALTH
MEDICAL CARE FACILITIES CERTIFICATE OF PUBLIC NEED**

THIS CERTIFIES THAT Mary Immaculate Hospital and Peninsula ASC, LLC, are authorized to initiate the proposal as described herein.

NAME OF FACILITY: Bon Secours Surgery Center

LOCATION: 580 City Center Boulevard, Newport News, Virginia 23606

OWNERSHIP AND CONTROL: Mary Immaculate Hospital and Peninsula ASC, LLC

SCOPE OF PROJECT: Establishment of an outpatient surgical hospital with two operating rooms relocated from Mary Immaculate Hospital, in accordance with specifications and representations made during the course of review. The total authorized capital cost of the project is \$12,237,537. The project is scheduled to be completed by December 1, 2020. This certificate is issued with the condition that appears on its reverse.



Pursuant to Chapter 4, Article 1:1 of Title 32.1, Sections 32.1-102.1 through 32.1-102.11, Code of Virginia (1950), as amended and the policies and procedures promulgated thereunder, this Medical Care Facilities Certificate of Public Need is issued contingent upon substantial and continuing progress towards implementation of the proposal within twelve (12) months from the date of issuance. A progress report shall be submitted to the State Health Commissioner within twelve (12) months from the date of issuance along with adequate assurance of completion within a reasonable time period. The Commissioner reserves the right not to renew this Certificate in the event the applicant fails to fulfill these conditions. This Certificate is non-transferable and is limited to the location, ownership, control and scope of the project shown herein.

Certificate Number: VA-04693

Date of Issuance: December 9, 2019

Expiration Date: December 8, 2020

M. Norman Oliver, MD, MA
State Health Commissioner

Condition Placed on the Issuance of this Certificate:

Mary Immaculate Hospital and Peninsula ASC, LLC, will provide surgical services to all persons in need of this service, regardless of their ability to pay, and will provide as charity care to all indigent persons free services or rate reductions in services and facilitate the development and operation of primary care services to medically underserved persons in an aggregate amount equal to at least 4.6% of total patient services revenue derived from surgical services provided at Bon Secours Surgery Center as valued under the provider reimbursement methodology utilized by the Centers for Medicare and Medicaid Services for reimbursement under Title XVIII of the Social Security Act, 42 U.S.C. § 1395 et seq. Compliance with this condition will be documented to the Division of Certificate of Public Need annually by providing audited or otherwise appropriately certified financial statements documenting compliance with the preceding requirement. Mary Immaculate Hospital and Peninsula ASC, LLC, will accept a revised percentage based on the regional average after such time regional charity care data valued under the provider reimbursement methodology utilized by the Centers for Medicare and Medicaid Services for reimbursement under Title XVIII of the Social Security Act, 42 U.S.C. § 1395 et seq., is available from Virginia Health Information. The value of charity care provided to individuals pursuant to this condition shall be based on the provider reimbursement methodology utilized by the Centers for Medicare and Medicaid Services for reimbursement under Title XVIII of the Social Security Act, 42 U.S.C. § 1395 et seq.

**RECOMMENDATION
TO THE STATE HEALTH COMMISSIONER
FOLLOWING AN INFORMAL FACT FINDING
CONFERENCE REGARDING CERTIFICATE
OF PUBLIC NEED (COPN or "Certificate")
REQUEST NUMBER VA-8437
MARY IMMACULATE HOSPITAL d/b/a
BON SECOURS MARY IMMACULATE HOSPITAL AND
PENINSULA ASC, LLC
NEWPORT NEWS, PLANNING DISTRICT (PD) 21
HEALTH PLANNING REGION (HPR) V
ESTABLISHMENT OF AN OUTPATIENT SURGICAL HOSPITAL
THROUGH RELOCATION OF TWO OPERATING ROOMS (ORs)**

I. Introduction

This document is a recommended case decision. It is submitted to the State Health Commissioner (hereinafter, the "Commissioner") for his adoption. It follows an informal fact-finding conference (IFFC) conducted in accordance with the Virginia Administrative Process Act (APA),¹ and has been written after a review of the Virginia Department of Health's (Department) administrative record of the above-referenced application for a COPN. This recommended decision follows the statutory considerations that the Commissioner must consider in determining whether to grant a COPN.²

II. Authority

Article 1 of Chapter 4 of Title 32.1 (§ 32.1-102.1 et seq.) of the Virginia Code (the "COPN law") addresses medical care facilities and provides that "[n]o person shall commence any project without first obtaining a [certificate] issued by the Commissioner."³ The COPN law defines "project" to include the above-captioned proposal.⁴

III. Procedural Background; Submittal of Documents for the Record

1. An IFFC on the project was held on August 16, 2019, in the County of Henrico. Principle agents of the co-applicants appeared and were represented by legal counsel. The co-applicants were given the opportunity to present evidence on the merits of their project through the submission of exhibits and the recording of witness testimony. Through counsel, the applicants presented argument on the evidence.

2. A facilities planning analyst from DCOPN⁵ attended the IFFC and presented that division's staff report on the project, dated May 20, 2019 (the "DCOPN staff report"). In the DCOPN staff

¹ Va. Code § 2.2-4000 et seq., *specifically*, Va. Code § 2.2-4019; *see also* Va. Code § 32.1-102.6.

² Va. Code § 32.1-102.3 (B).

³ Va. Code § 32.1-102.3 (A).

⁴ Va. Code § 32.1-102.1.

⁵ DCOPN is the work unit, or division, within the Department that comprises the Commonwealth's professional health facilities planning staff.

report, that division recommends the denial of the proposed project (the "BSMIH-Peninsula ASC project").

3. At the end of the IFFC, a briefing schedule was devised for post-IFFC submittals. The close of the adjudicatory record occurred on September 26, 2019.

4. The factual bases underlying the recommended decision made herein consist of evidence in the administrative record, including information in the application and responses to completeness questions from the co-applicants, the DCOPN staff report, the transcript of the IFFC, and submittals made by the applicant's counsel subsequent to the IFFC. The current document discusses the most salient facts and argument made in relation to the proposed project, as it is gauged against the statutory considerations, below.

5. By reference, I hereby incorporate the DCOPN staff report into the present document for the purpose of establishing or corroborating basic and un rebutted facts and demonstrating analysis that supports or helps substantiate the evidentiary basis on which the recommendation made herein rests.

Findings of Fact and Conclusions of Law

Based on the administrative record, I make and offer the following findings of fact and conclusions of law:

1. Mary Immaculate Hospital, Inc., operates a 123-bed hospital in Newport News. Mary Immaculate Hospital, Inc., and Peninsula ASC, LLC ("Peninsula ASC"), a Virginia limited liability company, are joint applicants in this review.

2. Originally, the co-applicants proposed the establishment of a four-OR freestanding outpatient surgical hospital (OSH), with two of the ORs being relocated from Mary Immaculate Hospital. At the IFFC, the co-applicants reduced the scope of the project to two ORs, both to be relocated from the hospital. The original total capital costs were \$12,237,537, without financing.

3. A. The Proposed Project in Relation to the Eight Statutory Considerations. Facts and conclusions about the project regarding the statutory considerations include:

1. The extent to which the proposed service or facility will provide or increase access to needed services for residents of the area to be served, and the effects that the proposed service or facility will have on access to needed services in areas having distinct and unique geographic, socioeconomic, cultural, transportation, and other barriers to access to care.

DCOPN states the proposed project would be readily accessible geographically to residents of PD 21. Regarding socioeconomic barriers to care, in 2017 BSMIH provided 2.94 percent of its adjusted gross patient revenues in charity care, well below the average for HPR V of 4.6 percent. This fact allows the question whether the project would be socioeconomically accessible to residents to be raised.

Fifty-eight general purpose ORs serve PD 21. BSMIH and Peninsula ASC state that its project, as amended at the IFFC, would be inventory neutral, thereby not adding to a four-OR surplus in PD 21.

The co-applicants envision the ORs will facilitate the performance of complex orthopedic procedures, including joint replacements, in the outpatient setting. The ORs will be sized, configured and equipped in such a manner to accommodate these procedures. These procedures are currently performed in the hospital setting at BSMIH, but no ORs in PD 21 are currently built specifically to accommodate the space needed for orthopedic surgery, according to the co-applicants.

Commercial payors and Medicare are increasingly recognizing that complex orthopedic and joint replacement surgeries can be performed safely and effectively in a dedicated outpatient setting.

No compelling or constructive argument regarding access exists for restricting the reasonable reallocation of OR resources as proposed by the co-applicants.

2. The extent to which the project will meet the needs of the residents of the area to be served, as demonstrated by each of the following:

(i) The level of community support for the project demonstrated by citizens, businesses, and governmental leaders representing the area to be served;

DCOPN received numerous letters of support for the project, and three letters in opposition to the project, as detailed in the DCOPN staff report. Riverside Regional Medical Center and Sentara oppose the project.

(ii) The availability of reasonable alternatives to the proposed service or facility that would meet the needs of the population in a less costly, more efficient, or more effective manner;

The status quo is not as reasonable an alternative as is approval of the project. The ORs at Sentara Port Warwick Surgery Center and Mary Immaculate Ambulatory Surgery Center (MIASC), while underutilized, are not sized, configured and equipped to handle the surgeries envisioned by the co-applicants.

No reasonable alternative to the proposed project accomplishes the goal of addressing the surgeries envisioned by the co-applicants.

(iii) Any recommendation or report of the regional health planning agency regarding an application for a certificate that is required to be submitted to the Commissioner pursuant to subsection B of § 32.1-102.6;

No regional health planning agency exists to assist the Commissioner by making recommendations on applications for a COPN in HPR V.

(iv) Any costs and benefits of the project;

The total capital costs of the project were \$12,237,547 when it contemplated four ORs in the OSH. No financing costs are associated with the project.

The benefits of the project involve moving surgical procedures, primarily orthopedic, from BSMIH to the outpatient setting, resulting in reduced costs and potentially improved outcomes. DCOPN recognizes that the project would improve access to outpatient surgical services and respond to growing demand for affordable and accessible surgical facilities that are designed to accommodate recent shifts in health care reimbursement that are intended to transition care to outpatient settings. DCOPN also states that the project would decompress high surgical utilization at BSMIH.

v) The financial accessibility of the project to the residents of the area to be served, including indigent residents;

The co-applicants have confirmed they would accept a charity care condition on the project. If approved, DCOPN and I recommend a charity care condition reflecting the average provided in HPR V in of 4.6 percent of gross patient revenues.

(vi) At the discretion of the Commissioner, any other factors as may be relevant to the determination of public need for a project.

No factors, other than those discussed elsewhere in this document, relating to the review of this project are clearly remarkable or appear to call for the exercise of the Commissioner's discretion in identifying or evaluating them in relation to the proposed project.

3. The extent to which the application is consistent with the State Medical Facilities Plan.

The COPN law requires that "[a]ny decision to issue . . . a certificate shall be consistent with the most recent applicable provisions of the State Medical Facilities Plan ["SMFP"]" ⁶ The SMFP, found in the Virginia Administrative Code (VAC), beginning at 12 VAC 5-230-10 et seq., includes several provisions applicable to the Norfolk General project. ⁷ The most salient provisions are discussed here.

Driving Time. The SMFP provides that surgical services should be within a 30 minute drive time for 95 percent of the population of a PD. DCOPN states that it is reasonable to conclude that existing surgical services in PD 21 currently meet this standard.

Need for New Service. Using the computational methodology in the SMFP, and reflecting a recent one-OR approval, the number of existing and approved ORs in PD 21 is 59 – reflecting a surplus of five ORs. Since the two ORs that would be in the facility built if the project were approved would be relocated from BSMIH, there would be no addition to the existing surplus. Since the project would be available to perform procedures now performed at BSMIH, I see no considerable adverse effect on other PD 21 facilities.

Approval of the project would improve distribution of surgical services, result in surgical services being provided at a lower cost to patients and optimize the number of operations performed on an outpatient basis, thereby showing consistency with 12 VAC 5-230-500.B.

⁶ Va. Code § 32.1-102.3.

⁷ 12 VAC 5-230-80, -490 through -510.

The evidence as a whole shows that the project, as reduced in scope to the relocation of two ORs, is consistent with the applicable provisions of the SMFP.

4. The extent to which the proposed service or facility fosters institutional competition that benefits the area to be served while improving access to essential health care services for all persons in the area to be served.

The project proposed by the co-applicants is not proposed to foster institutional competition. The co-applicants, however, state the project promises the benefit of an improvement in access to certain surgical procedures by relocating OR capacity from the higher-cost hospital setting to the lower cost Medicare-certified outpatient setting.

5. The relationship of the project to the existing health care system of the area to be served, including the utilization and efficiency of existing services or facilities.

DCOPN's recommendation of denial rested in considerable part on the fact that the project, before being reduced in scope, would add to the surplus of ORs in PD 21. As reduced in scope, it would not. It will involve minimal and reasonable effects on the existing health care system in the area.

The project is responsive to an evolving healthcare landscape in which payors increasingly recognize that complex orthopedic and joint replacement surgeries can be safely and effectively performed in a lower-cost, dedicated outpatient setting.

6. The feasibility of the project, including the financial benefits of the project to the applicant, the cost of construction, the availability of financial and human resources, and the cost of capital.

DCOPN finds the project financially feasible. It would likely be financially beneficial to the co-applicants. The costs of construction are reasonable and the project would involve no financing costs. Obtaining human resources should not be problematic, with the reduction in scope halving the original needs. Moreover, half of the required personnel is expected to relocate from BSMIH.

7. The extent to which the project provides improvements or innovations in the financing and delivery of health services, as demonstrated by: (i) The introduction of new technology that promotes quality, cost effectiveness, or both in the delivery of health care services; (ii) The potential for provision of services on an outpatient basis; (iii) Any cooperative efforts to meet regional health care needs; (iv) At the discretion of the Commissioner, any other factors as may be appropriate.

While this statutory consideration is generally not applicable, the ORs would be specifically sized, configured and equipped for the performance of complex joint replacement surgeries in the ambulatory setting. Such ORs are not presently available in PD 21, except to the extent they are located within acute care hospitals.

8. In the case of a project proposed by or affecting a teaching hospital associated with a public institution of higher education or a medical school in the area to be serve (i) the unique research, training, and clinical mission of the teaching hospital or medical school,

and (ii) any contribution the teaching hospital or medical school may provide in the delivery, innovation, and improvement of health care for citizens of the Commonwealth, including indigent or underserved populations.

Not applicable.

B. Conclusions.

Based on the findings of fact made above, I conclude that, approval of the BSMIH-Peninsula ASC project would be reasonable and appropriate under the COPN law, as it would address a public need through a reasonable enhancement of existing services and bring an improvement in their accessibility.

V. Recommendation

Based on my assessment, I conclude that the BSMIH-Peninsula ASC project merits approval. The co-applicants should receive a certificate authorizing its project, subject to a charity care condition of 4.6 percent. The project is necessary to meet a public need.

In addition to conclusions drawn throughout this document, specific reasons for my recommendation include:

- (i) The BSMIH-Peninsula ASC project is consistent with the SMFP, or is in overall harmony or general agreement with the SMFP and the public interests and purposes to which that plan is devoted;
- (ii) Approval of the proposed project would responsibly reallocate existing authorized resources without adding to the surplus of ORs in PD 21;
- (iii) The project would promote operational efficiency, clinical sophistication and cost effectiveness by providing a dedicated ambulatory setting for performing complex orthopedic procedures presently performed in a higher-cost hospital setting;
- (iv) Approval of the project would have minimal negative effect on competition or the utilization of existing providers of surgical services in PD 21; and
- (v) The project is feasible and no alternatives offering the benefits of the project exist.

Respectfully submitted,



Douglas R. Harris, JD
Adjudication Officer

November 8, 2019